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No. 90-5358

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly determined the applicable offense Guideline under Sentencing Guidelines § 1B1.2 on the basis of undisputed facts presented at petitioner's plea proceeding that were not part of a plea agreement.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-8, is reported at 903 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The petition for a writ of certiorari was filed on August 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Maryland on one count of assaulting a federal officer, in violation of 18 U.S.C. 111, and one count of using a

firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced under the Sentencing Guidelines to consecutive terms of imprisonment of 63 months on the assault count and 60 months on the firearms count, to be followed by a three-year term of supervised release. He was also ordered to pay a $50 special assessment.

1. The facts underlying the convictions, which are not in dispute, are set forth in the court of appeals' opinion and in the transcript of the plea proceeding. Pet. App. 2; C.A. Supp. App. 20-23. In September 1974, petitioner was confined to St. Elizabeth's Hospital after he was found not guilty by reason of insanity in the United States District Court for the District of Columbia on a charge of bank robbery. On May 12, 1988, the United States Marshal for the District of Columbia received an arrest warrant charging petitioner with unauthorized leave from the hospital. On June 9, 1988, the Marshal's Service learned that petitioner was living in Mt. Rainier, Maryland. Early the next morning, four deputy United States marshals went to petitioner's apartment, knocked on the door, and announced that they had a warrant for petitioner's arrest. Although no one answered the door, the deputy marshals could hear movement in the apartment. They knocked again, identified themselves, and unlocked the door. Petitioner then fired a .38 caliber revolver through the doorway, but no one was hit. Shortly thereafter, petitioner fired another round through the doorway, again hitting no one. Petitioner told the marshals he was not coming out and that he was not going back

to the hospital. He threatened to kill them if they came into the apartment. The deputy marshals called for reinforcements, and the Prince Georges County Emergency Response and Crisis Intervention Team arrived and took over. Petitioner fired two more shots before he was eventually subdued with tear gas and arrested. Pet. App. 2; C.A. Supp. App. 22. After his arrest, petitioner stated that he knew the marshals were knocking on the door but he did not want to return to the hospital. Pet. App. 2; C.A. Supp. App. 23.

2. Petitioner was indicted on three counts: (1) attempting to kill the four deputy marshals, in violation of 18 U.S.C. 1114; (2) assaulting the marshals, in violation of 18 U.S.C. 111; and (3) using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner's counsel obtained an eight-month continuance for a psychiatric examination, after which he advised the court that petitioner was competent to stand trial and would not enter an insanity defense. Pet. App. 2.

In May 1989, petitioner pleaded guilty without a plea agreement on the assault and firearms counts. Pet. App. 2-3. After the government recited the facts set forth above, petitioner agreed that the government could prove the facts stated with two exceptions. First, petitioner disagreed that the two bullets aimed at the deputy marshals were fired at different times. Second, petitioner disagreed that the gun was on his person when he was arrested, stating instead that it was found in the apartment. C.A. Supp. App. 23-24. The district court determined that petitioner understood the rights he waived by pleading guilty, informed him

that the court would determine how the Sentencing Guidelines applied to him, reminded him that the attempted murder count was still outstanding, and found that there was a factual basis for the plea. C.A. Supp. App. 6-25. At this juncture, petitioner's counsel informed the district court that he had explained to petitioner that, despite the absence of a formal plea agreement, the government might be induced to dismiss the attempted murder count if it were satisfied with the sentence on the counts on which petitioner pleaded guilty. Id. at 15-16.

3. At sentencing, the district court determined -- on undisputed facts -- that petitioner committed attempted murder and therefore should be sentenced for the assault offense under Guidelines § 2A2.1, relating to attempted murder, rather than under Guidelines § 2A2.2, relating to aggravated assault. Pet. App. 6. The district court calculated petitioner's applicable Guideline range to be from 51 to 63 months in prison, based on a total offense level of 23 and a criminal history category of II. [1] It

[1] The total offense level of 23 is derived from a base offense level of 20 under Guidelines § 2A2.1(a), plus 3 points under Guidelines § 3A1.2(a) because the victims were federal law enforcement officers. If petitioner had been sentenced under the aggravated assault Guideline, assuming no upward departure because of the seriousness of the offense, his adjusted offense level would have been 18 points (derived from a base offense level of 15 points under Guidelines § 2A2.2(a), plus 3 points under Guidelines § 3A1.2(a) because the victims were federal law enforcement officers).

Petitioner was also convicted and sentenced for using a firearm in the commission of a crime of violence in violation of 18 U.S.C. 924(c), to which a mandatory, consecutive term of imprisonment of five years applies. See 18 U.S.C. 924(c); Sentencing Guidelines § 2K2.4. Therefore, petitioner's adjusted (continued...)

based this conclusion on the fact that Guidelines § 1B1.2 requires the court to apply the Guideline "most applicable to the offense of conviction," "[p]rovided, however," that where a guilty plea or plea of nolo contendere "contain[s] a stipulation that specifically establishes a more serious offense than the offense of conviction," the court must apply the Guideline "most applicable to the stipulated offense" (emphasis omitted).

Petitioner's counsel argued that the proviso to Guidelines § 1B1.2 is not applicable here because petitioner did not stipulate to a more serious offense but only entered "a plea, like every other plea, where [the defense] acknowledge[d] the statement of fact, said, that's what happened." C.A. App. 46. Rather than "get into the technicalities whether it's 1B1.2 or 1B1.3" (the latter provision defines relevant conduct for sentencing), the district court observed that it could "consider all the conduct -- relevant conduct in setting the offense level and making adjustments." Pet. App. 7. Relying on Guidelines § 1B1.3, the district court held that petitioner's conduct constituted attempted murder, and sentenced petitioner accordingly. Pet. App. 7. In the alternative, the district court said that it would reach the same result even if it accepted petitioner's argument that the aggravated assault Guideline was applicable:

[1](...continued)
offense level was not increased by the 5 points that would otherwise apply because petitioner discharged a firearm in the course of committing the offense. See Sentencing Guidelines §§ 2A2.1(b)(2)(A), 2A2.2(b)(2)(A); id. § 2K2.4, Application Note 2.

> [I]f for some reason I was incorrect legally in making and considering those facts and setting the offense level, I would use them to depart under 1B1.4 up to the level where I am -- within which I am sentencing.

Pet. App. 7.

4. The court of appeals affirmed. Pet. App. 1-8. It held that the district court properly applied the Guideline for attempted murder in accord with Sentencing Guidelines § 1B1.2. It reasoned that the authority set forth in that Section to use a stipulation to determine the applicable Guideline was not limited to formal written stipulations, but instead applied to "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." Pet. App. 7. It found that petitioner's agreement with the government's proffer of facts constituted such a stipulation, and that the stipulated facts supported the district court's finding that petitioner committed attempted murder. Ibid. [2/] In light of its conclusion, the court of appeals did not reach the district court's alternative holdings that petitioner's sentence could be upheld either as an application of Guidelines § 1B1.3 (defining relevant conduct), or as an upward departure from the sentencing range applicable to the offense of aggravated assault. Pet. App. 8.

[2/] The court of appeals agreed with petitioner's contention that the district court erred in declining to consider whether he was entitled to a 2-point reduction for acceptance of responsibility; it remanded for a determination whether petitioner was entitled to the reduction. Pet. App. 3-5. The court of appeals also held that the district court correctly added 3 points to petitioner's offense level because his victims were law enforcement officers. Id. at 8. Petitioner does not challenge these rulings in this Court. Pet. 5-6.

Judge Sprouse dissented on the majority's interpretation of Guidelines § 1B1.2. Pet. App. 8. In his view, a stipulation requires an explicit agreement. Ibid.

ARGUMENT

Petitioner contends that the court of appeals improperly calculated his sentence under Sentencing Guidelines § 1B1.2. Pet. 6-10. In petitioner's view, the sentencing court must apply the Guideline applicable to the offense of conviction unless a plea agreement includes a written stipulation to facts that show that he committed a more serious offense. No stipulation so defined existed in this case. Petitioner's construction is erroneous and does not merit the attention of this Court.

1. Calculation of the base offense level applicable to an offense involves three steps.

a. First, the sentencing court must determine under Guidelines § 1B1.2 which Guideline applies to the offense of conviction. That Section requires in subsection (a) that the sentencing court

> [d]etermine the offense guideline in Chapter Two (Offense Conduct) most applicable to the offense of conviction * * *. Provided, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

Application Note 1 to Guidelines § 1B1.2 explains that:

> [t]he exception to the general rule [that applies in the event of a stipulation] has a practical basis. In cases where the elements

> of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. * * * Then, the probation officer might need to calculate the * * * guideline [for the more serious offense established by the stipulated facts] in determining the appropriate degree of departure in a case in which the defendant pled guilty to [one offense] but admitted committing [a more serious offense]. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.

Pursuant to Guidelines § 1B1.2, the courts of appeals have consistently held that, if a defendant has agreed to facts establishing a more serious offense than the one to which he has pleaded guilty, the sentencing court must impose a sentence appropriate for the more serious offense. See, e.g., United States v. Castro-Cervantes, No. 89-50145 (9th Cir. Aug. 9, 1990); United States v. Roberts, 898 F.2d 1465 (10th Cir. 1990); United States v. Martin, 893 F.2d 1990 (5th Cir. 1990); United States v. Strong, 891 F.2d 82 (5th Cir. 1989).

b. Second, once the sentencing court determines the applicable Guideline, it must determine the applicable sentencing range in accord with Sentencing Guidelines § 1B1.3 (relevant conduct). Sentencing Guidelines § 1B1.2(b). Section 1B1.3 provides that in determining the applicable sentencing range, the sentencing court shall consider, inter alia,

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense; [and]
>
> * * * * *
>
> all harm that resulted from the acts or omissions [described] above, and all harm that was the object of such acts or omissions[.]

Sentencing Guidelines § 1B1.3(a)(1), (a)(3).

c. Finally, if the applicable Guideline does not adequately consider an aggravating or mitigating factor present in the case that should result in a sentence different from that specified in the applicable sentencing range, the sentencing court may depart from the applicable Guideline, stating its reasons for doing so. 18 U.S.C. 3553(b), (c). "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. §3661." Sentencing Guidelines § 1B1.4. Accordingly, the courts of appeals have held that the sentencing court may depart upward from the Guideline applicable to the offense of conviction in order to impose a sentence reflecting the real offense, even if the defendant did not enter into a stipulation in connection with a guilty plea. See, e.g., United States v. Castro-Cervantes, supra; United States v. Zamarripa, 905 F.2d 337 (10th

Cir. 1990); United States v. Kim, 896 F.2d 678, 684-685 (2d Cir. 1990); United States v. Rutter, 897 F.2d 1558 (10th Cir. 1990); United States v. Strong, 891 F.2d at 85. An upward departure may be based on the Guideline that would have applied if the defendant had been convicted of the more serious offense (subject, of course, to the statutory maximum sentence applicable to the offense of conviction). See, e.g., United States v. Kim, 896 F.2d at 684-685; United States v. Strong, 891 F.2d at 85.

2. In this case, the court of appeals correctly concluded that petitioner's acceptance of the government's proffer of facts at the plea proceeding constituted a stipulation within the meaning of Sentencing Guidelines § 1B1.2(a).

a. We agree with the court of appeals that "stipulation" means "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." Pet. App. 7. The language of the proviso requires only that the stipulation "specifically establish[]" the offense; it does not require the stipulation to be "formal," Pet. 7, nor does it require that it be in writing. Moreover, the purpose of the proviso permitting sentencing on a stipulation is fully served here. The district court made clear that it would have imposed the same sentence whether it sentenced petitioner directly under the attempted murder Guideline or sentenced him by departing from the aggravated assault Guideline. The district court took the less cumbersome approach, consistent with the purpose of avoiding unnecessarily complicated sentencing proceedings in plea situations.

b. Petitioner offers no convincing reason why "stipulation" should be defined more narrowly, as consideration of the possible restrictive definitions demonstrates.

First, Guidelines § 1B1.2 cannot fairly be read to require that the defendant stipulate to the offense itself rather than to facts establishing the offense. The proviso refers to "a stipulation that specifically establishes a more serious offense" (emphasis added), thereby contradicting the notion that the defendant must stipulate to the offense itself. Significantly, petitioner's authorities repeatedly hold stipulations to facts establishing the elements of an offense to be "stipulations" within the meaning of Guidelines § 1B1.2. United States v. Martin, 893 F.2d 73, 76 (5th Cir. 1990) ("stipulated facts" can establish guilt); United States v. Strong, 891 F.2d 82, 83, 84, 85 (5th Cir. 1989) ("stipulated to facts" establishing guilt); United States v. Garza, 884 F.2d 181, 181 (5th Cir. 1989) (same).

Second, Guidelines § 1B1.2 does not imply that a stipulation must be in writing. Again, the proviso expressly states the requirements for an effective stipulation: it must be in conjunction with a plea of guilty or nolo contendere and must "specifically establish[]" the more serious offense. None of the cases or commentary cited by petitioner requires a stipulation to be in writing.

Third, the stipulation need not be part of a plea agreement. Again, the text of Guidelines § 1B1.2 requires only that the stipulation be made "in the case of conviction by a plea of guilty

or nolo contendere." The requirement of an agreement is neither stated nor implied. Although the commentary cited by petitioner does draw this conclusion, see Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S. Car. L. Rev. 495, 501 (1990), it does so based on the authority of the four court of appeals cases cited at Pet. 7-8. Those cases do not support petitioner's contention that a stipulation must be a quid pro quo for a plea to a lesser charge. [3] Even if Guidelines § 1B1.2 did require a stipulation to be the consideration for a plea to a lesser charge, petitioner received the benefit of his tacit plea bargain when the government decided, in accord with the discussion among the parties and the court at the plea proceeding, to dismiss the attempted murder count following sentencing because the sentence on the assault count adequately reflected the seriousness of petitioner's conduct.

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[3] The case coming closest to that conclusion is United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988), which stated that "facts admitted by the defendant to shorten or obviate a sentencing hearing do not establish a 'stipulated offense' within the meaning of section 1B1.2(a)." Id. at 248. The court of appeals thereby distinguished between a stipulation entered into at a plea proceeding (the kind at issue here) and one entered into at a sentencing hearing (the kind at issue in Guerrero):

> The proviso applies only to a stipulation contained in a plea of guilty or nolo contendere, not to a stipulation negotiated after a plea in connection with sentencing.

Ibid. We disagree with the distinction drawn by the court of appeals in that case because it finds no support in the text of Guidelines § 1B1.2; that Section requires a stipulation to be in a "case of conviction" by plea, but nowhere requires the stipulation to be made contemporaneously with the plea. In any event, the Guerrero court's distinction does not help petitioner, because his stipulation occurred during the course of the plea proceeding.

3. Whether "stipulation" for purposes of Guidelines § 1B1.2 is construed broadly or narrowly, petitioner's sentence would not be affected because it is sustainable on either of two independent grounds.

First, the district court sentenced petitioner according to the attempted murder Guideline under Guidelines § 1B1.3 (relevant conduct). That Section authorizes the sentencing court to take into account "all acts and omissions committed or aided and abetted by the defendant * * * that occurred during the commission of the offense of conviction." See pp. 8-9 (quoting § 1B1.3), supra. Petitioner attempted to murder the deputy marshals at the same time he committed the assault and firearms violations. That attempt is therefore relevant conduct within the meaning of Guidelines § 1B1.3.

Alternatively, the district court announced its intention to depart upward and impose precisely the same sentence even if the Guideline for aggravated assault were applicable. See pp. 5-6, supra. Indeed, petitioner's counsel invited the district court at the plea proceeding to "depart upward if you think [petitioner] tried to murder the Marshals." Pet. App. 6.

In light of these two independent grounds -- neither of which is challenged by petitioner in this Court -- his sentence does not warrant review. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (Court "reviews judgments, not opinions").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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